Supreme Court, U.S.
FILED

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No.
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In The

# Supreme Court of the United States

October Term, 1996

HOUSE OF LLOYD, INC.,

*Petitioner,*

*vs.*

FEDERAL INSURANCE COMPANY,

*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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45 pp

## QUESTION PRESENTED

In a court-tried case, when the parties agree to save the time and cost, as well as the judicial resources, associated with a full-blown trial by presenting the evidence to the district court through stipulations of fact and documentary submissions, is the prevailing party to be penalized by the Court of Appeals reviewing the district court's findings of fact under the "de novo" instead of the "clearly erroneous" standard.

## LIST OF PARTIES

The names of all parties to the proceedings in the Court of Appeals whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of petitioner to be listed.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| List of Parties | ii |
| Table of Contents | iii |
| Table of Citations | iii |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Statement of the Case | 1 |
| Reasons for Granting the Writ | 4 |
| Conclusion | 10 |


## TABLE OF CITATIONS

**Cases Cited:**


| | |
|---|---|
| *Aetna Casualty and Surety Company v. General Electric Company*, 758 F.2d 319 (8th Cir. 1985) | 6 |
| *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) | 8, 9 |
| *Folger Coffee Company v. Great American Insurance Company*, 333 F. Supp. 1272 (W.D. Mo. 1971) | 7 |

*Contents*


| | Page |
|---|---|
| *Hass v. Darigold Products Co.*, 751 F.2d 1096 (9th Cir. 1985) | 6 |
| *In re Tully*, 818 F.2d 106 (1st Cir. 1987) | 8, 10 |
| *In re U.S. Financial Securities Litigation*, 729 F.2d 628 (9th Cir. 1984) | 5, 6 |
| *New Hampshire Ball Bearings v. Aetna Casualty and Surety Company*, 43 F.3d 749 (1st Cir. 1995) | 6 |
| *Reliance Steel Products Company v. National Fire Insurance Company of Hartford*, 880 F.2d 575 (1st Cir. 1989) | 7 |
| *United States v. United States Gypsum Company*, 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948) | 7 |
| *United States Liability Insurance Company v. Selman*, 70 F.3d 684 (1st Cir. 1995) | 8 |
| **Statute Cited:** | |
| 28 U.S.C. § 1254(1) | 1 |
| **Rules Cited:** | |
| Federal Rule of Civil Procedure 52 | 4, 6 |
| Federal Rule of Civil Procedure 52(a) | 7, 8 |

*Contents*

*Page*

**APPENDIX**

**Appendix A — Order Denying Petition for Rehearing of the United States Court of Appeals for the Eighth Circuit Dated August 12, 1996** ..... 1a

**Appendix B — Opinion of the United States Court of Appeals for the Eighth Circuit Filed June 25, 1996** ..... 2a

**Appendix C — Order of the United States District Court for the Western District of Missouri, Western Division Filed January 26, 1995** ..... 15a

**Appendix D — Memorandum and Order of the United States District Court for the Western District of Missouri, Western Division Filed September 26, 1994** ..... 24a

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 86 F.3d 847 and is reproduced in the Appendix filed herewith (App.) at 2a. Unreported opinions of the district court in this case are reproduced at 15a and 24a.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 25, 1996. The Court of Appeals denied House of Lloyd, Inc.'s petition for rehearing and suggestions for rehearing en banc on August 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

On April 28, 1987, House of Lloyd, Inc. ("House of Lloyd") entered into a contract with Versa Corporation ("Versa") whereby Versa agreed to supply and install conveyor subsystems at House of Lloyd's distribution facility located in Grandview, Missouri. On November 27, 1987, after Versa delivered the conveyor subsystems and while Versa was in the process of installing such conveyor subsystems, the conveyor subsystems were damaged or destroyed in a fire at the distribution facility.

A policy of insurance issued by Federal Insurance Company ("Federal") to Versa was in effect at the time of the fire. The Federal policy included an "Installation Form," which provided:

> 1. PROPERTY COVERED
>
> This policy insures the property of the

> Insured and the property of others for which the Insured may be liable, consisting principally of mechanical material handling equipment and metal products. (sic)
>
> all intended for installation at: various locations.

House of Lloyd brought the present action in federal district court on the basis of diversity jurisdiction asserting two breach of contract claims against Versa (Counts I and II) and an alternative breach of contract claim against Federal (Count III).

As to Versa's liability, Counts I and II of the complaint alleged that Versa bore the risk of loss for the conveyor subsystems at the time of the fire. Count III was an alternative claim against Federal should the district court rule in favor of Versa and against House of Lloyd on the risk of loss issue. In other words, if the district court determined that the risk of loss for the conveyor subsystems had already passed to House of Lloyd at the time of the fire, House of Lloyd alleged that Federal owed coverage for the loss because the conveyor subsystems were "the property of others [House of Lloyd] for which [Versa] may be liable." On the other hand, a ruling in favor of House of Lloyd and against Versa on the risk of loss issue would have rendered the claim for insurance proceeds against Federal moot.

In the course of the litigation, the parties stipulated to a separation of issues for trial purposes. The parties agreed to first have the risk of loss issue (Counts I and II) tried by the court. Then, depending on the outcome on that issue, a second trial would be held on the insurance coverage issue.

By consent of the parties, the first trial was conducted by a magistrate judge. On June 7, 1993, the magistrate judge ruled that Versa was not liable to House of Lloyd because the risk of loss for the conveyor subsystems passed to House of Lloyd upon delivery.[1] This finding triggered House of Lloyd's claim under the "Installation Form," as well as its cause of action asserted in Count III against Federal.

Federal did not dispute that in accordance with the terms of the "Installation Form," the conveyor subsystems were the "property of others [House of Lloyd] ... consisting principally of mechanical, material handling equipment and metal products (sic) all intended for installation at various locations." Nor did Federal dispute that it was responsible for installation of the conveyor subsystems. Federal's sole contention was that the conveyor subsystems were covered only if Versa was liable for the loss. The term "liable" was not defined in Federal's policy.

At the pretrial conference with the district court judge, the Honorable Howard F. Sachs, the parties agreed to a bench trial on Count III based on stipulated facts and documentary submissions. In addition, Judge Sachs ordered extensive briefing on the issue of Federal's liability.

In his Order dated September 26, 1994, Judge Sachs ruled that coverage of property "for which the Insured (Versa) may be liable . . ." must be construed as covering property for which

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1. In an Order dated July 19, 1993, the magistrate judge held that the June 7, 1993, ruling was interlocutory and not a final and appealable judgment. After the district court entered judgment in favor of House of Lloyd on the issue of Federal's liability in January of 1995, the magistrate judge ordered entry of final judgment in favor of Versa in accordance with the June 7, 1993, order. House of Lloyd did not file a cross-appeal with respect to the "risk of loss" issue.

Versa had assumed responsibility, regardless of its legal liability for the loss. Judge Sachs then invited briefing by the parties regarding the amount of money owed by Federal under its policy. On January 26, 1995, Judge Sachs found that Federal was liable for $1,045,884.05 under the terms of its policy.

On appeal, the United States Court of Appeals for the Eighth Circuit stated, "Upon careful *de novo* review, we hold that the district court erred in concluding that the Federal policy covered Lloyd's loss in the present case." (App. B, 11a). Accordingly, the Court of Appeals reversed the judgment of the district court in favor of House of Lloyd against Federal, and remanded this case to the district court with instructions to enter judgment for Federal. (App. B, 14a).

## REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve the split between the federal circuit courts of appeals concerning application of Fed. R. Civ. P. 52 and the proper standard of review when the findings of the district court depend upon its election among conflicting facts or its choice of competing inferences drawn from undisputed facts and documentary submissions.

As stated previously, the dispute between House of Lloyd and Federal centered on the following language set forth in the "Installation Form" policy: "This policy insures . . . the property of others for which the Insured may be liable . . . ." (App. B, 7a). As stated by Judge Sachs, "The issue confronting the district court was whether Versa should be considered 'liable' for the uninstalled subsystems, thereby allowing recovery by House of Lloyd on the Federal policy." (App. D, 25a-26a). In this regard, the district court examining the terms of the policy in its entirety and relying on extrinsic evidence, made the following findings of fact.

The district court found that there was shared possession of the subsystem components, not exclusive possession in Versa, the party which had the contract obligations but no longer owned the property. (App. D, 27a). The district court also found that the duty to install, however, was a continuing responsibility of Versa and, thus, Versa remained at least "equitably responsible for the property that it was to install and for which it would presumably have actual priority in handling, despite technically shared possession." (App. D, 27a). In addition, the district court found that the specified duration of coverage under the "Installation Form" policy definitely included the installation period, "which strongly indicates that the period during which Versa would be 'liable' was contemplated as extending through installation and until acceptance." (App. D, 27a).

Moreover, the district court further relied on extrinsic evidence in the form of Federal's own "Underwriting Guidelines" in arriving at its conclusion that the Federal policy covered House of Lloyd's loss. At Footnote 2 of his Memorandum and Order, Judge Sachs stated that, "It may also be noted that when Federal wanted to discuss 'legal liability' it knew such express wording was appropriate. (Doc. 231, Exh. C.)." (App. D, 27a-28a). "Doc. 231, Exh. C" consists of the "Underwriting Guidelines" issued by Federal applicable to its "Installation Form" policies. The "Underwriting Guidelines" can be found in the Joint Appendix that was filed with Court of Appeals. Portions of the "Underwriting Guidelines" are also set forth verbatim in the Court of Appeals' opinion. (App. B, 9a-10a, n. 5).

When the inquiry extends beyond the words of the contract and focuses on related facts, the trial court's interpretation of the contract will not be reversed unless it is clearly erroneous. *In re U.S. Financial Securities Litigation,* 729 F.2d 628, 632

(9th Cir. 1984). The appellate court will upset an essentially factual determination made by a district court in the course of interpretation of contract if and only if it is clearly erroneous. *Hass v. Darigold Dairy Products Co.*, 751 F.2d 1096, 1101 (9th Cir. 1985). The "clearly erroneous" standard also applies to a trial court's resolution of mixed questions of fact and law. *New Hampshire Ball Bearings v. Aetna Casualty and Surety Company*, 43 F.3d 749, 752 (1st Cir. 1995). The district court's review of extrinsic evidence is entitled to great deference and its interpretation of the contract will not be reversed unless it is clearly erroneous. *In re U.S. Financial Securities Litigation, supra*, 729 F.2d at 632.

Furthermore, under the clearly erroneous standard of review, the Court of Appeals will reverse the district court's finding of fact only if review of the entire record leaves it with the definite and firm conviction that a mistake has been made. *Aetna Casualty and Surety Company v. General Electric Company*, 758 F.2d 319, 323 (8th Cir. 1985). In addition, the burden is placed on the appellant to demonstrate error under Fed. R. Civ. P. 52. *Id.*

Returning to the Court of Appeals' opinion, the court did not restrict its review of the district court's interpretation of the "Installation Form" policy to an analysis of the language used in the contract. Instead, its inquiry extended beyond the words of the policy and focused on extrinsic evidence.

According to the Court of Appeals, a letter written by Federal to its insured long after the loss demonstrates "not only that Federal refused to provide a defense for Versa, but also that Versa understood the Installation Floater to be indemnity provision." (App. B, 12a-13a). The Court of Appeals further relied upon the fact that "Versa, not Lloyd, is the party that 'bought and paid for the insurance.' " (App. B, 13a). The Court

of Appeals went on to reject outright the district court's finding of fact that Versa "remained at least 'equitably' responsible for the property it was to install" as in *Folger Coffee Company v. Great American Insurance Company*, 333 F. Supp. 1272 (W.D. Mo. 1971), and improperly substituted its own finding of fact "that Versa was not legally or equitably 'responsible' for the conveyor subsystems within the meaning of *Folger Coffee*." (App. B, 13a-14a).

The appellate court's review is not so unbridled that it can reject the district court's findings on the basis that, reviewing the case *de novo*, it arrives at a different conclusion. As stated by this Court when confronted with the applicable standard of review of a trial court's findings based on inferences drawn from documents or undisputed facts, appellate review is circumscribed by the clearly erroneous standard which allows the reviewing court to reject a finding of the district only if it is "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Company*, 333 U.S. 364, 394-395, 68 S. Ct. 525, 542-543, 92 L. Ed. 746 (1948).

In addition, in reviewing the rulings of the district court sitting without a jury, the "clearly erroneous" standard governs findings of fact regarding the significance of documentary evidence, the factual meaning of contract provisions and what the actor intended. *Reliance Steel Products Company v. National Fire Insurance Company of Hartford*, 880 F.2d 575, 576 (1st Cir. 1989). Furthermore, where the conclusions of the district court depend upon its election among conflicting facts or its choice of which competing inferences to draw from undisputed basic facts, an appellate court should defer to such fact-intensive findings, absent clear error. *Id.*

Fed. R. Civ. P. 52(a) provides, in pertinent part, that,

"Findings of fact, *whether based on oral or documentary evidence,* shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (Emphasis added). Fed. R. Civ. P. 52(a) commands, and the precedents ordain, that deference be paid to the trier's assessment of the evidence. *United States Liability Insurance Company v. Selman,* 70 F.3d 684, 688 (1st Cir. 1995). Moreover, it is well-established that the clearly erroneous rule loses none of its vigor when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. *Anderson v. City of Bessemer City,* 470 U.S. 564, 574, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518 (1985); *In re Tully,* 818 F.2d 106, 108 (1st Cir. 1987). Justice White, writing for the majority in *Anderson v. City of Bessemer City, supra,* explained:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to the case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too

> much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road'." *Wainwright v. Sykes*, 433 U.S. 72, 90 [97 S. Ct. 2497, 2508, 53 L. Ed. 2d 594] (1977). For these reasons, *review of factual findings under the clearly-erroneous standards — with its deference to the trier of facts — is the rule, not the exception.*

(Emphasis added). *Id.* at 574-575, 105 S. Ct. at 1512-1513.

Returning to the facts in this case, this action was pending before the district court for over five years. During that time, Judge Sachs addressed countless pretrial motions including Federal's motion to dismiss and cross-motions for summary judgment filed by all three parties. The pretrial briefings alone covered hundreds of pages.

Following the bench trial before the magistrate judge on Counts I and II of House of Lloyd's complaint, Count III was then tried to Judge Sachs. This second trial generated literally several hundred more pages of briefing by the parties and numerous hearings before Judge Sachs. The record discloses that Judge Sachs' ruling was meticulously made after years of studied review of the facts, documentary submissions, briefs and arguments of the parties. However, using a "de novo" standard of review, the Court of Appeals in five short paragraphs and without citation to the relevant authority, struck Judge Sachs' rulings. Clearly, the Court of Appeals erroneously considered the extensive proceedings before Judge Sachs to be nothing more than a "tryout on the road."

The federal courts of appeal must give "clearly erroneous"

deference to findings of fact stemming from evidence that is documentary or by stipulation of the parties because the appellate function does not differ just because the parties attempted to expedite the trial by obviating the need for live witnesses. *See In re Tully, supra,* 818 F.2d at 109. Even where the evidence at trial consists solely of documentary evidence and stipulated facts, the Court of Appeals must respect the district court's credibility evaluation and adopt the district court's findings unless they are clearly erroneous.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AUGUST 12, 1996

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1597WMKC

House of Lloyd, Inc.,

Appellee,

v.

Federal Insurance Company,

Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 12, 1996

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

## APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JUNE 25, 1996

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1597

House of Lloyd, Inc.,

Appellee,

v.

Versa Corporation, doing business as Versa, Ferguson Conveyor Corporation,

Defendant.

Federal Insurance Company,

Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: November 15, 1995

Filed: June 25, 1996

Before McMILLIAN, FLOYD R. GIBSON, and LOKEN, Circuit Judges.

McMILLIAN, Circuit Judge.

*Appendix B*

Federal Insurance Company (Federal) appeals from a final judgment entered in the United States District Court for the Western District of Missouri in favor of House of Lloyd, Inc. (Lloyd), on Lloyd's claim for insurance proceeds to cover the replacement cost of certain equipment that was destroyed by a fire on Lloyd's property while being installed by Federal's insured, Versa Corporation (Versa). *House of Lloyd, Inc. v. Versa Corp.*, No. 89-0943-CV-W-6 (W.D. Mo. Jan. 26, 1995). For reversal, Federal argues that the district court erred in holding that (1) the loss of property was covered by the policy Federal issued to Versa (the Federal policy) even though the risk of loss had passed from Versa to Lloyd, *id.* (June 7, 1993) (magistrate judge's order disposing of risk of loss issue), and (2) Federal's share of the insurance liability was 83%, as compared to 17% attributed to Lloyd's insurer, Travelers Indemnity Company (Travelers). *Id.* (Sept. 26, 1994) (district court order disposing of coverage issue); *id.* (Jan. 26, 1995) (district court order disposing of monetary allocation issue). For the reasons discussed below, we hold that the Federal policy did not cover the loss of property at issue in the present case. Accordingly, we reverse the judgment of the district court in favor of Lloyd against Federal, decline to reach the allocation issue as moot, and remand this case to the district court with instructions to enter judgment for Federal.

**Background**

The background facts are stated in detail in the magistrate judge's order dated June 7, 1993. *Id.*, slip op. at 1-12 (June 7, 1993). The following is a brief summary of the facts. On April 28, 1987, Lloyd entered into a contract with Versa whereby Versa agreed to supply and install conveyor subsystems at Lloyd's distribution facility under construction, located on Botts Road

in Grandview, Missouri. On November 27, 1987, after the conveyor subsystems had been delivered, but before installation was complete, they were damaged or destroyed in a fire at the Lloyd distribution facility. The Federal policy insuring Versa was in effect at the time of the fire. The Federal policy contained an "Installation Floater," which included the following provision:

> 1. PROPERTY COVERED:
>
> This policy insures the property of the Insured and the property of others for which the Insured may be liable, consisting principally of mechanical material[,] handling equipment and metal products.

Joint Appendix, Vol. II, at 600 (attachment to parties' joint stipulation of facts). Lloyd also had an insurance policy issued by Travelers (the Travelers policy), which was in effect at the time of the fire and undisputedly covered Lloyd's loss.[1]

Lloyd brought the present action in federal district court on the basis of diversity jurisdiction, asserting two breach of contract claims against Versa (Counts I and II) and a contract claim against Federal (Count III). As to Versa's liability, Counts I and II of the complaint alleged that Versa bore the risk of loss of the conveyor subsystems at the time of the fire. As to Federal's liability, Count III alleged that, under the terms of the Installation Floater in the Federal policy, the conveyor subsystems were "property of others for which [Versa] may be liable."

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1. Lloyd asserts, however, that there was dual coverage under the Federal policy and the Travelers policy.

*Appendix B*

In the course of the litigation, the parties stipulated to a separation of issues for trial purposes. The parties agreed to first have the risk of loss issue tried by the court; afterward, depending on the outcome in that bench trial, a jury trial would be held on the remaining liability issues. *House of Lloyd, Inc. v. Versa Corp.*, slip op. at 2 (Apr. 16, 1992) (order incorporating parties' stipulation). By consent of the parties, the first trial was conducted by a magistrate judge. The magistrate judge held that Versa was not liable to Lloyd because the risk of loss of the conveyor subsystems passed to Lloyd upon delivery. *Id.*, slip op. at 12-28 (June 7, 1993).[2]

Following the magistrate judge's June 7, 1993, ruling on the risk-of-loss issue, the district court required the parties to file stipulated facts and ordered briefing on the issue of Federal's liability.[3] The district court then disposed of the issue of Federal's liability without a jury trial or a bench trial. *Id.* (Sept. 26, 1994)

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2. In an order dated July 19, 1993, the magistrate judge held that the June 7, 1993, ruling was interlocutory and not a final and appealable judgment or order. *House of Lloyd, Inc. v. Versa Corp.*, No. 89-0943-CV-W-6 (W.D. Mo. July 19, 1993). Later, after the district court entered judgment in favor of Lloyd on the issue of Federal's liability, the magistrate judge ordered entry of final judgment in favor of Versa in accordance with the June 7, 1993, order. *Id.* (Mar. 17, 1995). Lloyd has not cross-appealed with respect to the risk-of-loss issue. Accordingly, the final determination that the risk of loss passed from Versa to Lloyd upon delivery of the conveyor subsystems is not reviewable in the present appeal and must be accorded appropriate deference as the law of the case.

3. These procedural steps were taken by the district court despite the court's earlier ruling that, if Lloyd were found in the initial bench trial to have borne the risk of loss vis-a-vis Versa, then a jury trial would be held on Lloyd's remaining claim against Federal. *Id.*, slip op. at 2 (Apr. 16, 1992).

(memorandum and order).[4] In its order dated September 26, 1994, the district court held that the Federal policy covered Lloyd's loss because coverage under the Installation Floater was triggered by Versa's equitable responsibility for the conveyor subsystems, notwithstanding the fact that the risk of loss had passed from Versa to Lloyd. *Id.* at 3. The district court then invited briefing regarding the amount of money owed by Federal. Following that briefing, the district court found that Federal was liable for $1,045,884.05 of the total loss, and Travelers was liable for the remaining $214,217.21. *Id.* at 7 (Jan. 26, 1995) (allocating liability according to a ratio of relative liability derived by comparing applicable limits in two policies). Judgment was entered. *Id.* (Jan. 26, 1995); *id.* (Mar. 17, 1995). Federal appealed.

## Discussion

We first consider our standard of appellate review. As noted above (see note 3 supra), neither the district court's orders nor any other documentation in the record on appeal reveals the specific procedural mechanism employed by the district court in deciding the issue of Federal's liability. However, whether

4. It is unclear from the materials provided on appeal how the district court procedurally reached the issue of Federal's liability in the manner it did. As noted above, the district court's order of April 16, 1992, stated that the issue of Federal's liability would be tried by a jury if Lloyd were found to have borne the risk of loss. *Id.* No jury trial or bench trial was held, however, and instead the district court ruled on the merits, apparently relying solely on the facts stipulated by the parties and the magistrate judge's findings. *Id.* (Sept. 26, 1994) (memorandum and order). Federal asserts in its brief on appeal that this is an "appeal from a civil bench trial." Brief for Appellee at 6. Lloyd, by contrast, asserts that "the District Court's judgments . . . were in the nature of summary judgment." Supplement to Brief of Appellant (filed May 16, 1995).

we treat the district court's decision as a summary judgment disposition or the equivalent of a bench-tried matter, the standard of review is essentially the same. Assuming as true the facts to which the parties have stipulated, and the magistrate judge's uncontested finding that the risk of loss had passed from Versa to Lloyd upon delivery of the conveyor subsystems, we determine *de novo* whether, as a legal matter of contract interpretation, the Federal policy covered Lloyd's loss. For the reasons stated below, we hold that it did not.

The disposition of this case turns on the legal effect of the following words in the Installation Floater of the Federal policy: "this policy insures . . . the property of others for which the Insured may be liable, consisting principally of mechanical material[,] handling equipment and metal products." In arriving at the legal conclusion that these words required Federal's coverage for Lloyd's loss of the conveyor subsystems, the district court relied on *Folger Coffee Co. v. Great Am. Ins. Co.*, 333 F. Supp. 1272 (W.D. Mo. 1971) (*Folger Coffee*) (where bailee's insurance policy provided "the policy covers . . . property of others held by the insured for which the insured is liable," personal property of bailor damaged while in bailee's possession was covered under bailee's insurance policy regardless of whether the damage resulted from bailee's negligence or other wrongdoing). The district court held that the coverage provided under the Installation Floater for property of others for which Versa "may be liable" was not limited to losses for which Versa would be legally liable, but rather more broadly referred to losses of or damage to property of others for which the insured was legally or equitably responsible. *House of Lloyd, Inc. v. Versa Corp.*, slip op. at 2-3 (Sept. 26, 1994) (citing *Folger Coffee*, 333 F. Supp. at 1274-75 ("it is concluded that Missouri courts would follow the prevailing view and construe the word 'liable' in the policy in the case at bar to be synonymous with 'responsible' ")).

The district court then reasoned:

> If it seems adequately established, as in *Folger Coffee*, that "liable" should include the practical responsibilities of a bailee, regardless of legal liability, it will be acknowledged that the present case requires going a step or two beyond bailment situations. Unlike a bailment, there was here shared possession of the subsystem components, not exclusive possession in Versa, the party which had contract obligations but no longer owned the property. However, the duty to install was a continuing responsibility of Versa's, and in that sense it remained at least "equitably" responsible for the property that it was to install and for which it would presumably have actual priority in handling, despite technically shared possession. Moreover, the specified duration of coverage definitely included the installation period, which strongly indicates that the period during which Versa would be "liable" was contemplated as extending through installation and until acceptance.

*Id.* at 3.

In the present appeal, Federal argues that the district court's liability determination contradicts the plain meaning of the Installation Floater. Federal maintains that the language of the Installation Floater plainly indicates that Federal only provided coverage for damages that Versa was obligated to pay. Because

the risk of loss passed to Lloyd upon delivery, Federal argues, Versa was not obligated to pay damages; thus, there is no coverage under the Federal policy. Federal further argues that the district court erred in interpreting *Folger Coffee*. Unlike the bailee-insured in *Folger Coffee*, Versa, the insured in the present case, did not bear the risk of loss at the relevant time. The mere fact that Versa was responsible for installing the conveyor subsystems at the time of the fire, Federal argues, does not legally or equitably create responsibility to protect against the loss of or damage to that property, particularly where the property was not within Versa's exclusive custody and control.

Lloyd, by contrast, maintains that Federal's proposed interpretation of the Installation Floater suffers from the mistaken assumption that Federal provided coverage for liability when, in fact, Federal provided coverage for the loss of or damage to property. That covered property, Lloyd argues, included property of others for which Versa was responsible, including the conveyor subsystems. In support of this argument, Lloyd highlights the fact that the Installation Floater contains numerous references to the insured "property." Lloyd also relies on language in the Underwriting Guidelines for the Installation Floater[5] and a letter from Federal to Versa's attorney in which

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5. The Underwriting Guidelines provided in pertinent part:

> The interest of the owner, seller or contractor is covered against loss or damage to machinery, equipment, building materials or supplies being used with and during the course of installation, testing, building, renovating or repairing. Such policies provide coverage at points or places where work is being performed, while in transit, and during temporary storage or deposit.

(Cont'd)

Federal disclaimed a duty to defend Versa against Lloyd's claims on grounds that the Installation form was "not a liability form." [6] Responding to Federal's contention that the district court erred in its application of *Folger Coffee,* Lloyd disputes the notion, advanced by Federal, that *Folger Coffee* implicitly recognizes a distinction between bailment cases and non-bailment cases. Lloyd defends the district court's reasoning on grounds that *Folger Coffee* rests on a more fundamental distinction between coverage for liability and coverage for property. Finally, Lloyd argues that the district court's interpretation of the Installation Floater is consistent with Missouri state court cases which have recognized that insurance contract language referring to "property of others" for which the insured may be liable expresses an intent by the insurer to benefit parties other than

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(Cont'd)
Joint Appendix, Vol. II, at 614. Elsewhere the Underwriting Guidelines state:

> 1. *Property Covered*
>
> Our Builders Risk/Installation floater covers physical loss or damage to property during installation. It does not cover nor is *it intended to cover* the General Liability of the *Insured.* Every contractor and sub-contractor should be expected to have a General Liability policy to protect this exposure.

Joint Appendix, Vol. II, at 616 (emphasis in text).

6. When this lawsuit was initially brought by Lloyd, Versa contacted Federal and demanded that Federal provided Versa with a defense; Federal responded by letter stating that the Installation Form was "not a liability form, and therefore there is no duty to defend the insured against actions such as those alleged in the complaint, for breach of contract." *See* Joint Appendix, Vol. III, at 738 (letter).

the named insured and to pay them directly. Brief for Appellee at 18-23 (citing *Peters v. Employers Mut. Casualty Co.*, 853 S.W. 2d 300 (Mo. 1993) (en banc) (*Peters*) (policy provided coverage to college faculty members, not named in the policy, whose personal property was destroyed in a fire in the insured college's theater); *Mitchell v. K.C. Stadium Concessions, Inc.*, 865 S.W. 2d 779 (Mo. Ct. App. 1993) (*Mitchell*) (policy of lessee provided coverage to lessor, for damage to lessor's personal property resulting from a fire on the leased property); *Boatmen's First Nat'l Bank v. Hawkeye-Security Ins. Co.*, 861 S.W. 2d 600 (Mo. Ct. App. 1993) (*Boatmen's v. Hawkeye-Security*) (where insured sought coverage for personal property stolen from a warehouse and the actual title owner of the stolen property was not a named insured but was a corporation jointly owned by the insured and his wife, judgment for insurance company was reversed on grounds that ambiguities existed precluding determination of coverage issue at summary judgment stage)).

We agree with Lloyd that the Installation Floater at issue in the present case expresses an intent to benefit directly parties not named in the policy, where appropriate. However, upon careful *de novo* review, we hold that the district court erred in concluding that the Federal policy covered Lloyd's loss in the present case. Specifically, the district court's interpretation of the Installation Floater is inconsistent with that provision's ordinary and plain meaning. As the Missouri Court of Appeals explained in *Boatmen's v. Hawkeye-Security*, 861 S.W. 2d at 602,

> [t]he rules of construction applicable to insurance contracts require that the language used be given its plain meaning. *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W. 2d 695, 698

> (Mo. banc 1982) (citations omitted). If the policy is unambiguous, it must be inforced according to its terms. *Id.* If the language is ambiguous, it will be construed against the insurer. *Id.* Language is ambiguous if it is reasonably open to different constructions; and language used will be viewed in light of the meaning that would ordinarily be understood by the layman who bought and paid for the policy. *Id.*

Applying the above-stated principles to the undisputed facts of the present case, we hold that Lloyd's loss was not covered by the Federal policy by virtue of the Installation Floater. We hold that the relevant language of the Installation Floater ("this policy insures . . . the property of others for which the Insured may be liable") is clear and unambiguous: Federal must indemnify Versa for its liability arising out of the loss of or damage to property of others during installation. Furthermore, notwithstanding Federal's stated assertion that it did not have a duty to defend Versa, we read the words "may be" in the Installation Floater as signifying Federal's duty to defend Versa against claims arising out of the loss of or damage to property of others during Versa's installation. We interpret the words "may be" for the purpose of eliminating the possibility that those specific words indicate that Federal must cover Lloyd's losses regardless of Versa's obligation to pay. Federal's duty to defend Versa is not otherwise at issue in the present appeal.

Moreover, the meaning that would ordinarily be understood by the party which bought and paid for the policy (i.e., Versa) is that the Installation Floater operates as an indemnity provision. The letter from Federal to Versa upon which Lloyd relies

demonstrates, not only that Federal refused to provide a defense for Versa, but also that Versa understood the Installation Floater to be an indemnity provision. Significantly, Versa, not Lloyd, is the party which "bought and paid for the insurance." *Boatmen's v. Hawkeye-Security,* 861 S.W. 2d at 602. Accordingly, we hold as a matter of law that, under the facts of the present case, the Installation Floater imposed upon Federal no more than a duty to defend Versa and to indemnify Versa for its legal obligations to pay for the loss of or damage to property of others during Versa's installation.

Finally, our interpretation of the Installation Floater is consistent with *Folger Coffee.* Unlike Versa in the present case, the insured in *Folger Coffee* retained the risk of loss at all relevant times because of the parties' bailment relationship. In a bailment situation, the bailor can recover for loss of or damage to the bailment property upon proof that the loss or damage occurred while in the bailee's possession because an inference of negligence is raised under the res ipsa loquitur doctrine. *Royster v. Pittman,* 691 S.W. 2d 305, 308 (Mo. Ct. App. 1985). Versa was not a bailee in the present case. The mere fact that Versa had a contractual obligation to install the conveyor subsystems was not the same, for liability purposes, as a bailee's responsibility to protect against damage or loss, particularly in light of the fact that the conveyor subsystems were not even within Versa's exclusive custody and control but were located on Lloyd's property at the time of the fire, *Cf. Peters,* 853 S.W. 2d at 302-03 (where building-owner's policy provided coverage for "contents" of building, loss of personal property of plaintiffs who were not named insureds was covered "property of others" because it was destroyed while contained within the insured's building). Moreover, Lloyd is bound by the district court's determination that the risk of loss had passed to Lloyd at the

time of the fire. We therefore hold that Versa was not legally or equitably "responsible" for the conveyor subsystems within the meaning of *Folger Coffee.*

Accordingly, we reverse the judgment of the district court in favor of Lloyd against Federal, decline to reach the allocation issue as moot, and remand this case to the district court with instructions to enter judgment for Federal.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION FILED JANUARY 26, 1995

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 89-00943-CV-W-6

HOUSE OF LLOYD, INC.,

Plaintiff,

v.

VERSA CORPORATION d/b/a VERSA, FERGUSON CONVEYOR CORP., and FEDERAL INSURANCE CO.,

Defendants.

### ORDER

Pursuant to the court's order dated September 26, 1994, the parties in the above captioned action have filed their factual proof relating to monetary relief. The parties have also filed briefs on the issue of monetary relief and limited oral argument has occurred. The parties agree that plaintiff's total loss was $1,260,101.26. The parties further agree that, due to existence of "Other Insurance" clauses in both the Travelers policy and the Federal policy, the loss must be shared between Travelers and Federal based on the proportion that the policy limit of each bears to the total insurance. The court must therefore determine the applicable limits of the respective policies.

## *Appendix C*

### *The Travelers Policy*

The parties do not dispute that the Travelers policy covers losses of personal property up to $5,500,000. Plaintiff argues, however, that the appropriate limit of liability for the loss of the conveyor system is the $1,000,000 sub-limit established for the loss of "Newly acquired buildings or personal property or buildings under construction subject to 60 days reporting." Exhibit B to Federal's Factual Proof on Issue of Damages ("Federal Exhibit B") at 3. Defendant, on the other hand, contends that the $1,000,000 sub-limit, if applicable at all, applies only to those portions of the conveyor system that were not installed at the time of the loss. Defendant further argues that the Agreed Amount Endorsement of $15,500,000 for "Building" coverage applies to those portions of the conveyor system that had already been installed.

The court finds that plaintiff has, after some nudging, demonstrated that the $1,000,000 sub-limit for "newly acquired" property is applicable to the loss in question. Defendant argues that the term "newly acquired" is not defined in the policy and is "ambiguous with respect to how recently the property has to be acquired to be 'newly acquired.' " Federal's Reply Brief on Issue of Monetary Relief ("Federal's Reply Brief") at 5. Defendant is correct in noting that "newly acquired" is not defined in the Travelers policy. It seems entirely likely that the insurer intended to provide a lower limit of liability for buildings and personal property that were "newly acquired," in the sense that they were acquired after the effective date of the policy. This is common insurance usage. *Lowe v. State Farm Mut. Auto. Ins. Co.*, 420 So.2d 318, 319 (Fla. App. 1982). Plaintiff has now pointed to proof that the policy was effective in March 1987, and the materials in question went to the premises from May 1987 to the time of the fire. Trial Exhibit 68 (offered in proceedings before Magistrate Judge Hays).

*Appendix C*

The most serious issue presented by the "newly acquired" property provision, in my judgment, relates to the effect of phrase "subject to 60 days reporting." Defendant contends that this may signify that once reporting occurs the larger coverage for personal property applies. Plaintiff disputes that contention as an unreasonable construction but concedes that the phrase has no practical application in the policy in question, because no reporting system is specified. It is my conclusion that the phrase would normally signify that limited coverage applies initially for newly acquired property, but that if reporting is not made by the insured such coverage is lost. *Compare Lowe, supra.* I find it strained to suggest that the wording can reasonably be read as indicating that coverage balloons once reporting occurs. That may be common insurance practice, although not demonstrated to me, but it is not consistent with the wording in the policy.

It might be argued, therefore, that all pertinent coverage in the Travelers policy was lost by reason of failure to report by the insured, which would be highly favorable to plaintiff in this case. Since Travelers did not provide for a reporting system, however, and since there is no suggestion that Travelers disputed the continuing effect of coverage, it would appear that the insurer waived any contention like that suggested by the court, and thus the newly acquired property provision is not affected by the appendage relating to reporting.[1] Therefore, this court concludes that the $1,000,000 sub-limit of liability for "newly acquired . . . personal property" applies to the conveyor system.

---

1. I am not persuaded that defendant is bound by briefing that apparently concedes applicability of the $1,000,000 coverage provision, nor am I persuaded by plaintiff's argument that the reporting requirement should be construed to relate only to the last category of property listed, "buildings under construction."

Second, the court rejects defendant's contention that those portions of the conveyor system that were already installed were covered by the $15,500,000 limit of liability for "building" coverage. Defendant concedes that the building coverage only applies to the conveyor system if the system can be characterized as a "permanent fixture . . . pertaining to the services of such real property." Federal Exhibit B at 9. Defendant argues that there is "no dispute that the conveyors were permanently affixed to the Botts Road facility." Federal's Opening Brief on Issue of Monetary Relief ("Federal's Opening Brief") at 4. Plaintiff disagrees. In any event, the court finds that regardless of whether the installed portions of the conveyor were "permanent fixtures," defendant has failed to show that the conveyor pertained to the service of the building. Defendant's bare assertion that "the very nature of the conveyor system was to service the facility," Federal's Opening Brief at 4, is insufficient to meet its burden.

The district court's opinion in *Aetna Casualty and Surety Ins. Co. v. Honey Bear Brand, Inc.*, 711 F.Supp. 849 (W.D. N.C. 1989), is instructive on this point. The portion of the insurance policy construed in *Honey Bear* was nearly identical to the portion of the Travelers policy at issue here. As in *Honey Bear*, the defendant "argues persuasively that the machinery in question constituted 'fixtures' . . . having been permanently and physically attached to the warehouse." *Id.* at 850. "However . . . this is not dispositive of the issue. The policy, by its terms, does not cover all fixtures. . . ." *Id.* Instead, the policy covers only those fixtures "pertaining to the services of such real property. . . ." Federal Exhibit B at 9.

The phrase "pertaining to the services of the building," or "pertaining to the services of such real property," is a phrase that "appears from relevant case law to be a term of art with a

specific meaning." *Honey Bear,* 711 F.Supp at 850 (citing *Arlotte v. National Liberty Insurance Co.,* 312 Pa. 442, 167 A. 295 (Pa. 1933)). This court agrees that "when an insurance contract refers to fixtures that 'serve the building,' it means those that are placed there to assist in the maintenance and operation of the building itself, regardless of what the building is being used for." *Honey Bear,* 711 F.Supp at 850. Therefore, a distinction should be drawn between "fixtures which are there to 'help' the building, e.g., by strengthening it, providing utilities to it, providing fire protection, etc., and those which are there to be 'helped by' the building, by having a roof over them." *Id.* at 851. Defendant has produced no evidence that the conveyor system fell into the first category. Moreover, the court is persuaded by plaintiff's argument that the conveyor system at the Botts Road facility was no different from the apple grading and processing machines in *Honey Bear* and the soda fountain in *Arlotte.*[2] Therefore, the applicable limit of liability under the Travelers policy, for *all portions* of the conveyor system, is the $1,000,000 limit for damage to newly acquired personal property, rather than the $15,500,00 limit for damage to the building.

*The Federal Policy*

Both parties agree that, under the Federal policy, the general limit of liability "at any one installation site" is $5,000,000.

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2. Plaintiff states in its brief that the "Robo-pic is an automotic order-filling system comprised of a microcomputer hookup with cables and certain sensing devices through an array of dispensers . . . The dispensers themselves being electromechanical, feed the product onto a tub on a passing conveyor belt that assembles an order of merchandise to be shipped to a customer." Response of Plaintiff House of Lloyd, Inc. to Federal's Opening Brief on Issue of Monetary Relief ("Plaintiff's Response") at 12. This characterization of the conveyor system was not controverted by defendant.

Plaintiff argues that this is the appropriate limit for the loss of the conveyor system. Defendant agrees that $5,000,000 is the appropriate limit for those portions of the conveyor system which had already been installed at the time of the loss. Defendant contends, however, that Federal's liability is limited to $1,000,000 for those portions of the system that had not yet been installed. In order to find the $1,000,000 limit applicable here, the court would have to conclude, as Federal urges, that the uninstalled portions of the conveyor system were at a "temporary location awaiting installation." Exhibit A to Federal's Factual Proof on Issue of Damages ("Federal Exhibit A") at 21.

The court finds that Federal's proposed interpretation of its policy is contrary to the plain meaning of the terms contained in that policy. The parties agree that installation of the conveyor system had not been completed at the time of the loss. Federal has not demonstrated, however, that the uninstalled portions of the conveyor system were at a "temporary location." Defendant argues that the "limits pertaining to any one installation site apply to damage to the actual site where installation is occurring" and that the "limits pertaining to a temporary location awaiting installation apply to a storage area where the uninstalled portions of the conveyor are held until they are ready to become part of the installation site." Federal's Reply Brief at 2. Defendant maintains that any uninstalled portions of the conveyor "come under the limit for loss at a temporary location awaiting installation because, regardless of where they were actually stored, they were stored there temporarily until they could be installed." *Id.* at 2-3.

The court rejects defendant's strained reading of the Installation Form, Federal Exhibit A at 21. The plain language of the Form draws a clear distinction between a loss at an

"installation site," § 4(B) and a loss at a "temporary location," § 4(C). Contrary to defendant's suggestion, the court may *not* disregard the storage location of the property, because property stored at the installation site prior to installation is *not* property stored at a "temporary location." Thus, absent any evidence that the uninstalled portions of the conveyor were not being stored at the Botts Road facility, the court will apply the general limit of liability for "any one installation site" to the entire loss.

*Attorney's Fees*

Plaintiff apparently concedes that the only possible basis, statutory or otherwise, for the award of attorneys' fees in this matter is Mo. Rev. Stat. § 375.420 (1986). Section 375.420 permits the court to award "damages not to exceed twenty percent of the first fifteen hundred dollars of the loss, and ten percent of the amount of the loss in excess of fifteen hundred dollars and a reasonable attorney's fee . . ." where it "appears from the evidence" that an insurance company has refused to pay a loss without "reasonable cause or excuse. . . ." The court has already ruled, in its order dated September 26, 1994, that the question of liability in this case was quite close and that no penalty for vexatious refusal to pay is warranted. Plaintiff is correct in arguing that the court may award attorneys' fees under § 375.420 without awarding other "vexatious damages." *Travelers Indemnity Co. v. Woods,* 663 S.W.2d 392, 397 (Mo. Ct. App. 1983). However, it is clear that the court may not make *any* award under § 375.420 absent a finding that the refusal to pay was vexatious. Therefore, because the court has found no vexatious refusal to pay on the part of the defendant, plaintiff's request for attorneys' fees will be denied.

## *Appendix C*

### *Prejudgment Interest*

Plaintiff has requested an award of prejudgment interest at a rate of nine (9) percent per annum. Defendant has stated no objection, and plaintiff's request appears to be supported by relevant case law. *See, e.g. Nodaway Valley Bank v. Continental Casualty Co.*, 916 F.2d 1362, 1367 (8th Cir. 1990). Thus, plaintiff's request for prejudgment interest will be granted. Exhibit D to the parties' Joint Stipulation of Facts indicates that plaintiff made a claim on its loss under the Federal policy on August 2, 1988. Exhibit E to the Joint Stipulation shows that Federal denied plaintiff's claim on August 15, 1988. Thus, because Federal's breach under the policy in question occurred on August 15, 1988, the court will calculate prejudgment interest from that date.[3]

### *Conclusion*

The court has determined (1) that the applicable limit of liability under the Travelers policy is $1,000,000 and (2) that the applicable limit of liability under the Federal policy is $5,000,000. Therefore, the court finds that Travelers should bear 17% of the total loss of $1,260,101.26, or $214,217.21. The court further finds that defendant Federal must bear 83% of the loss, or $1,045,884.05. Accordingly, it is hereby

ORDERED that final judgment is entered in favor of the plaintiff and against defendant Federal Insurance Co. in the total amount of $1,653,019.72, which represents the principal amount

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3. Defendants' argument that the calculation of prejudgment interest should begin on the date Magistrate Judge Hays decided one of the issues in this case is an arbitrary contention and was not advanced in briefing.

of $1,045,884.05, plus prejudgment interest in the amount of $607,135.67.

s/ Howard F. Sachs
HOWARD F. SACHS
SENIOR DISTRICT JUDGE

Dated: January 26, 1995.

## APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION FILED SEPTEMBER 26, 1994

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 89-0943-CV-W-6

HOUSE OF LLOYD, INC.,

Plaintiff,

v.

VERSA CORPORATION D/B/A VERSA, FERGUSON CONVEYOR CORP., AND FEDERAL INSURANCE CO.,

Defendants.

### MEMORANDUM AND ORDER

The remaining parties have filed appropriate stipulations and briefing to assist the court in declining "all issues relating to insurance coverage" claimed by plaintiff (House of Lloyd) from defendant Federal Insurance Co. (Federal), insurer of property for defendant Versa Corporation.

Under the first stipulation (Doc. 231) it is agreed that Versa was a supplier of intended business fixtures for House of Lloyd, having agreed "to furnish and install four conveyor subsystems at the Botts Facility." Three days before the installation contract, Federal issued its insurance policy here in question. Three months later, before installation had been completed and before

acceptance of the completed work, the subsystems were damaged or destroyed by fire.

House of Lloyd also had pertinent insurance, a builder's risk policy, issued by Travelers Indemnity Company (Travelers). Travelers also later issued to House of Lloyd a property insurance policy. Certain payments have been made by Travelers to House of Lloyd.

Federal sought judgment on the pleadings which the court denied on March 26, 1992 (Doc. 157). The court's prior ruling was that the Versa policy with Federal contained a property insurance commitment covering "the property of others for which (Versa) may be liable" and that such "liability" has often been liberally construed to cover property for which an insured is "responsible," as in a bailment, without limitation to legal liability. The court also noted that the specified period of coverage was "during transit, while awaiting installation and during installation until . . . acceptance by the owner or purchaser. . . ."[1] Although observing that Federal had made respectable arguments against coverage, the court indicated that a "contrary reading of the policy seems more plausible, and consistent with the caselaw."

Because an alternate theory of recovery for plaintiff would be that the risk of loss remained with Versa, this issue was, by consent, tried by magistrate Judge Hays, who ruled, however, that the risk of loss had passed to House of Lloyd (Doc. 218). Thus, the court must make a final ruling on the issue of whether

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1. Both provisions are on the first page of the Installation Form rider (Exh. 1 to Plaintiff's Opening Brief [Doc. 234] in paragraphs 1 and 3.) The prior order erroneously referred to "paragraph C" instead of 3.

*Appendix D*

Versa should be considered "liable" for the uninstalled subsystems, thereby allowing recovery by House of Lloyd on the Federal policy.

Although the previous memorandum and order on this issue was handed down under circumstances in which Federal had a considerable burden of persuasion (seeking to escape on the bare-bones pleadings), fuller consideration causes me to reconfirm my prior impression that House of Lloyd is entitled to recover on the Federal policy purchased by Versa.

For two decades the Missouri law on this subject has been best expressed, without subsequent questioning, by Judge Becker of this court, in *Folger Coffee Co. v. Great American Insurance Co.*, 333 F.Supp. 1272 (W.D. Mo. 1971). It is not necessary to retravel the path covered by him in an elaborate opinion, noting that there are two lines of authority but that Missouri would probably follow the majority view that coverage of property for which an insured may be "liable" is to be understood as covering property for which it has assumed resumed responsibility, regardless of legal liability. The most common circumstance is where the insured is bailee of property.

There is only a hint in the Missouri caselaw, but Judge Becker reasonably concluded that "liable" in this context means something more than strict legal liability. The Missouri Supreme Court has opined that the word means " 'bound or obligated in law or equity; responsible; answerable.' " *Homan v. Employers Reinsurance Corp.*, 136 S.W.2d 289, 298 (Mo. 1936). Rulings elsewhere, as discussed by Judge Becker, are more conclusive.

If it seems adequately established, as in *Folger Coffee*, that "liable" should include the practical responsibilities of a bailee,

regardless of legal liability, it will be acknowledged that the present case requires going a step or two beyond bailment situations. Unlike a bailment, there was here shared possession of the subsystem components, not exclusive possession in Versa, the party which had contract obligations but no longer owned the property. However, the duty to install was a continuing responsibility of Versa's, and in that sense it remained at least "equitably" responsible for the property that it was to install and for which it would presumably have actual priority in handling, despite technically shared possession. Moreover, the specified duration of coverage definitely included the installation period, which strongly indicates that the period during which Versa would be "liable" was contemplated as extending through installation and until acceptance. Under Missouri law, the context of the policy as a whole must of course be considered. *Interco Inc. v. National Surety Corp.*, 900 F.2d 1264 (8th Cir. 1990).[2]

I therefore conclude, as I did more tentatively in 1992, that the Federal policy covers plaintiff's loss. Judgment will be entered for the plaintiff on the issue of liability. The remaining issues to be decided concern monetary relief. Plaintiff has prayed for damages, penalties for vexatious delay, attorneys' fees, and prejudgment interest and costs. The parties' briefing suggests that there was a misunderstanding as to the issues to be resolved by the court at this time, without further briefing. Defendant's Response Brief states on page 1 that ". . . damages issues have been reserved for a later date. Consequently, this brief will only address the issues pertaining to coverage." Plaintiff, on the other hand, believed that the only issues reserved for a later determination were vexatious delay and attorneys' fees. The

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2. It may also be noted that when Federal wanted to discuss "legal liability" it knew such express wording was appropriate. (Doc. 231, Exh. C).

confusion appears to have been the result of ambiguity in the phrase "issues relating to insurance coverage."

I find that I am able to resolve the issue of vexatious delay without further briefing. This was a very close case, as discussed above, and therefore I do not believe that any penalty for vexatious refusal to pay is warranted. However, as a result of the attorneys' confusion as to whether to brief issues relating to the amount of coverage, I suspect that the parties may not have adequately briefed issues relating to the amount of coverage, or damages that may be recovered from defendant.[3] Furthermore, as the parties apparently do not dispute, the issue of attorneys' fees and costs remains to be briefed.

Therefore, the parties shall submit factual proof relating to monetary relief on or before October 14, 1994. The parties should submit, for example, stipulations and/or affidavits in such form as would be usable in ruling on a motion for summary judgment on the issue of damages. On or before October 28, 1994, the parties should submit briefs on the remaining issues to be decided, excluding, as discussed above, the issue of vexatious delay. Any responsive briefs should be filed no later than November 2, 1994.

SO ORDERED.

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3. The "Other Insurance" argument is not a defense to coverage, since both policies contained "Other Insurance" clauses. The law requires that under those circumstances, the loss shall be prorated equally between the two policies up to the limit of the lower policy. Thus the question of relevant limits of liability becomes a question of the appropriate *amount* of recovery and should be briefed accordingly.

*Appendix D*

s/ Howard F. Sachs
HOWARD F. SACHS
SENIOR DISTRICT JUDGE

Dated: Sept. 26, 1994.